## LEE HENG MOY & ORS v. PACIFIC TRUSTEES BHD & ORS

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
ZAMANI A RAHIM JCA
MARY LIM JCA
[CIVIL APPEAL NO: W-02-(NCVC)(A)-1455-09-2015]
3 MAY 2016

***CIVIL PROCEDURE:*** *Appeal – Appeal by vexatious litigant – Whether litigant restrained from instituting any legal proceeding without leave of judge – Whether litigant's failure to obtain leave disentitled litigant to pursue appeal – Courts of Judicature Act 1964, Schedule, para. 17*

***CIVIL PROCEDURE:*** *Judgment and orders – Enforcement – Consent order – Whether should be constituted as contract between parties – Whether parties bound to give effect to consent order*

The late Tan Hok Low ('Tan') died intestate. At the time of his death, Tan had three wives and nine children. Since Tan had died intestate, there were several suits filed by various parties in respect of the grant of letters of administration and the distribution of his estate. One of those suits was an appeal ('Appeal 1140') filed by Tan's lawful wife ('the first appellant') in the Court of Appeal. A consent order was recorded in the Court of Appeal resolving not just Appeal 1140 but also several other consolidated suits where the first appellant acted not just for herself but her four children *ie* the second to the fifth appellants. Amongst the terms of the consent order was the appointment of the first respondent as administrator of the estate of Tan. Another critical term of the consent order pertained to the distribution of the estate of Tan. The net effect of the consent order was that the first appellant would be entitled to 25% and all of Tan's nine children would each be entitled to 8.33% of the estate. In the course of administering the estate, the first respondent faced resistance from some of the beneficiaries who felt that the estate ought to be distributed in accordance with the Distribution Act 1958 instead of the manner provided for in the consent order. Therefore, the first respondent sought the court's directions and declaratory orders to facilitate the proper administration of the estate of Tan ('the proceeding'). The High Court allowed the first respondent's application. Hence the appeal, amongst others, by the first appellant. The first appellant was declared to be a 'vexatious litigant' pursuant to para. 17 of the Schedule to the Courts of Judicature Act 1964 ('CJA') by an order of the High Court. The order was duly gazetted and had not been set aside. Therefore, the first respondent raised the point that the first appellant needed to obtain leave of the court before proceeding with the present appeal.

**Held (dismissing appeal with costs)**
**Per Mary Lim JCA delivering the judgment of the court:**

**(1)** The object and intent behind para. 17, Schedule to the CJA is to prevent the abuse of the process of court by persons who 'habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons'. Once a person is pronounced as a 'vexatious litigant', the person is required to obtain leave of a judge to have access to the courts. (paras 16 & 17)

**(2)** The phrase 'instituting legal proceedings' in para. 17, Schedule to the CJA would extend to the present appeal proceedings. The term 'instituting' does not necessarily refer to commencing for the first time. It extends to where a litigant is responding to the proceedings instituted against the litigant. Further the phrase 'legal proceedings' is not confined to originating proceedings. It includes and extends to proceedings in relation to an appeal. Therefore, although the first appellant did not institute the proceedings in the first place and that she was merely pursuing a right of appeal as a dissatisfied party, the first appellant was required to obtain leave before instituting the appeal proceedings. Since the first appellant had not obtained the leave of a judge before instituting the present appeal, the present appeal was not maintainable by her. (paras 23-26)

**(3)** It is fairly settled and trite law that an order of the court reached by consent of the parties involved is in effect a contract between those parties. Unless and until the consent order is set aside, the parties to the consent order, without exception, are bound to carry it into effect. That being so, the orders sought by the first respondent were in order and the High Court Judge made no error, in law or on the facts, in granting the order in the terms made. (paras 30 & 33)

***Bahasa Malaysia*** *Headnotes*

Mendiang Tan Hok Low ('Tan') meninggal dunia tanpa wasiat. Pada masa kematiannya, Tan mempunyai tiga orang isteri dan sembilan orang anak. Oleh kerana Tan meninggal dunia tanpa wasiat, terdapat beberapa guaman difailkan oleh pelbagai pihak berhubung geran surat kuasa mentadbir dan pengagihan harta pusakanya. Salah satu daripada guaman tersebut adalah rayuan ('Rayuan 1140') yang difailkan oleh isteri sah Tan ('perayu pertama') di Mahkamah Rayuan. Perintah persetujuan direkodkan di Mahkamah Rayuan menyelesaikan bukan sahaja Rayuan 1140 tetapi juga beberapa guaman bersepadu lain di mana perayu pertama bertindak bukan sahaja untuk dirinya tetapi bagi empat orang anaknya iaitu perayu kedua hingga kelima. Antara syarat-syarat perintah persetujuan ialah pelantikan responden pertama sebagai pentadbir harta pusaka Tan. Syarat perintah persetujuan terpenting lain adalah berhubung dengan pengagihan harta pusaka Tan.

Kesan utama perintah persetujuan adalah perayu pertama akan berhak kepada 25% dan setiap sembilan orang anak Tan berhak kepada 8.33% daripada harta pusaka. Dalam pentadbiran harta pusaka tersebut, responden pertama berdepan dengan tentangan daripada beberapa orang waris yang merasakan bahawa harta pusaka sepatutnya dibahagikan sejajar dengan Akta Pembahagian 1958 dan bukannya dengan cara yang diperuntukkan dalam perintah persetujuan. Oleh itu, responden pertama menuntut arahan dan perintah perisytiharan mahkamah bagi memudahkan pentadbiran harta pusaka Tan ('prosiding'). Mahkamah Tinggi membenarkan permohonan responden pertama. Maka rayuan, antara lain, oleh perayu pertama. Perayu pertama diisytiharkan sebagai 'vexatious litigant' menurut perenggan 17 Jadual Akta Mahkamah Kehakiman 1964 ('AMK') oleh perintah Mahkamah Tinggi. Perintah telah diwartakan dan tidak diketepikan. Oleh itu, responden pertama membangkitkan perkara bahawa perayu pertama perlu mendapatkan kebenaran mahkamah sebelum meneruskan dengan rayuan ini.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:**

**(1)** Objek dan niat di sebalik perenggan 17 Jadual AMK adalah bagi mengelak penyalahgunaan proses mahkamah oleh mereka yang 'habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons'. Sebaik sahaja seseorang disebut sebagai 'vexatious litigant', dia dikehendaki mendapatkan kebenaran hakim bagi mengakses mahkamah.

**(2)** Frasa 'instituting legal proceedings' yang digunakan dalam perenggan 17 Jadual AMK akan merangkumi prosiding rayuan ini. Istilah 'insituting' tidak semestinya merujuk kepada permulaan untuk kali pertama. Ia meliputi di mana litigan bertindak balas kepada prosiding yang dimulakan terhadap litigan. Selanjutnya frasa 'legal proceedings' tidak terhad kepada prosiding pemula. Ia termasuk dan meliputi prosiding berhubung dengan rayuan. Oleh itu, walaupun perayu pertama tidak memulakan prosiding dari awal dan hanya menuntut hak untuk merayu sebagai pihak yang tidak berpuas hati, perayu pertama perlu mendapatkan kebenaran sebelum memulakan prosiding rayuan. Oleh kerana tertuduh pertama tidak mendapat kebenaran hakim sebelum memulakan rayuan, rayuan ini tidak boleh dipertahankan.

**(3)** Adalah undang-undang matan bahawa satu perintah mahkamah yang dicapai mengikut persetujuan pihak-pihak yang terlibat adalah kontrak antara pihak-pihak berkenaan. Melainkan jika dan sehingga perintah persetujuan diketepikan, pihak-pihak kepada perintah persetujuan, tanpa pengecualian, bertanggungan untuk menunaikannya. Dengan itu, perintah yang dituntut oleh responden pertama adalah teratur dan Hakim Mahkamah Tinggi tidak membuat sebarang kekhilafan, dari segi undang-undang atau fakta, dalam memberikan perintah mengikut syarat yang dibuat.

**Case(s) referred to:**
*Ganapathy Chettiar v. Lum Kum Chum & Ors And Another Appeal [1981] 1 LNS 59 FC* ***(refd)***
*Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC* ***(refd)***
*Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal [1974] 1 LNS 143 FC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, Schedule para 17

*For the appellants - In person*
*For the 1st respondent - C Vilasini & G Sumathi; M/s Sumathi & Assocs*
*For the 2nd to 7th respondents - Arthur Wang Ming Way; M/s Arthur Wang, Lian & Assocs*

*[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: 24NCVC-426-03-2015 (affirmed)].*

*Reported by Sandra Gabriel*

## JUDGMENT

**Mary Lim JCA:**

**[1]** This is an appeal by the appellants against the decision of the High Court at Kuala Lumpur which had allowed the application by the first respondent, in relation to the distribution of the estate of Tan Hok Low, deceased. For convenience, the parties shall be referred to or how they were referred to at the High Court.

**Background Facts**

**[2]** By an amended originating summons dated 24 March 2015, the plaintiff, the administrator of the estate of Tan Hok Low, deceased sought the following orders:

(a) a declaration that the defendants are the lawful beneficiaries of the estate of Tan Hok Low, deceased

(b) that the defendants are entitled to the estate of Tan Hok Low, deceased, in the following proportions:

| | | |
|---|---|---|
| 1. Lee Heng Moy | - | 25% |
| 2. Lim Tay See | - | Nil |
| 3. Tan Chee Chin | - | 8.33% |
| 4. Tan Ee Ling | - | 8.33% |
| 5. Tan Ping Quan | - | 8.33% |
| 6. Tan Ping Ren | - | 8.33% |
| 7. Tan Ea Shya | - | 8.33% |
| 8. Tan Ming Hui | - | 8.33% |
| 9. Tan Jin Thi | - | 8.33% |

10. Yasmine Tan Ee Mun - 8.33%

11. Tan Zhi Hui - 8.33%

(c) that the plaintiff shall proceed with the administration of the estate and distribute the estate in accordance with the law to the above beneficiaries in the aforesaid proportion.

**[3]** In order to understand why the plaintiff was in court for the above orders, one needs to go a bit further back in time. The antecedent facts are well narrated by the learned High Court Judge.

**[4]** The late Tan Hok Low (Tan) died intestate on 2 January 2003. At the time of his death, Tan had three wives and nine children. He was lawfully married to the first defendant with whom he had four children, namely the third to the sixth defendants. Tan also had two common law wives. The first was Gan Chiew Wan with whom he had three children, the seventh to the ninth defendants; the second was Tan Pui Sim with whom he had two children, namely the tenth and eleventh defendants. The second defendant is Tan's mother.

**[5]** Because Tan had died intestate, there were several suits filed by various parties in respect of the grant of letters of administration and the distribution of his estate. One of those suits was an appeal filed by the first defendant in the Court of Appeal, that is, Civil Appeal No: B-02-1140-2007. On 29 July 2011, the Court of Appeal successfully mediated between the parties. A consent order was recorded in the Court of Appeal resolving not just Civil Appeal No. B-02-1140-2007 but also several other consolidated suits including Civil Suit No: MT4(MT3)(MT2)-22-180-2003 where the first defendant acted not just for herself but her four children who are the third to the sixth defendants in the present originating summons (consent order).

**[6]** Amongst the terms of that consent order was the appointment of the plaintiff as administrator of the estate of Tan. Letters of administration were duly granted to the plaintiff on 28 August 2013 at the High Court at Kuala Lumpur. Another critical term of the consent order relevant for the purpose of the originating summons pertains to the distribution of the estate of Tan, deceased. In the consent order, it was agreed that the estate of Tan shall be distributed as follow:

(a) the 1st defendant shall be entitled to 25%;

(b) the 2nd defendant shall allow her 25% entitlement to be distributed equally to the 9 children, namely the 3rd to 11th defendants; and

(c) the remaining 50% of the estate would be distributed to the 9th and 11th defendants equally.

**[7]** The net effect of the agreement in the consent order was that the first defendant would be entitled to 25% and the third to the eleventh defendants, that is, all nine children of Tan, would each be entitled to 8.33% of the estate.

**[8]** In the course of administering the estate, the plaintiff faced some resistance from some of the beneficiaries who felt that the estate ought to be distributed in accordance with the Distribution Act 1958 instead of the manner it had been provided for in the consent order and as set out above. Out of an abundance of caution, the plaintiff sought the court's directions and declaratory orders to facilitate the proper administration of the estate of Tan.

**[9]** The application was opposed by the first and third to sixth defendants whilst the remaining defendants had no objections. The fifth and sixth defendants were represented by one Lee Heng Yau, their maternal uncle who was appointed their guardian *ad litem* until they reached the age of majority by an order of the High Court at Shah Alam dated 25 November 2011.

**[10]** After hearing the parties, the High Court allowed the application in terms of prayers (1), (2) and (3) with a further order that reasonable costs arising from the application was to be borne and paid out of the estate of Tan, deceased. In essence, the High Court had ordered for the consent order to be given effect to by the plaintiff.

**[11]** Being dissatisfied with the order, the first and third to the sixth defendants appealed.

**Decision Of This Court**

**[12]** At the hearing before the High Court, all parties were legally represented except for the first and third to the sixth defendants. That position is the same before us. The first, third and fourth defendants appeared in person while the fifth and sixth defendants were represented by their maternal uncle, Lee Heng Yau. He was appointed as their guardian ad litem by order of the High Court at Shah Alam on 25 November 2011.

**[13]** After hearing all concerned, including the first defendant, Lee Heng Yau, the third and the fourth defendants, we were unanimous in dismissing the appeal and we gave our brief reasons. These are our reasons in full.

**[14]** But, first, we shall address the point raised by learned counsel for the plaintiff, that is, the first defendant needs leave of the court before she can proceed with this appeal. This is because the first defendant is a "vexatious litigant" by order of the High Court at Shah Alam dated 21 May 2008. That order has been duly gazetted. That order has never been set aside.

**[15]** The power to pronounce any litigant before the court as a vexatious litigant is provided under para. 17 of the Schedule to the Courts of Judicature Act 1964 [Act 91]. Paragraph 17 reads as follow:

> Vexatious litigants
>
> 17. Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a Judge. A copy of any such order shall be published in the *Gazette*.

**[16]** The object and intent behind para. 17 is to prevent the abuse of the process of court by persons who "habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons". If left unchecked, these habitual and persistent institutions of legal proceedings by such persons which are furthermore without reasonable cause, are more than likely to undermine and stultify the proper administration of justice. Valuable time and resources of the court, the legal practitioners and the members of the public who have affected will be substantially wasted on attending to such legal proceedings.

**[17]** Once a person is found to have habitually, persistently and without reasonable cause instituted legal proceedings, such a person will be pronounced as a "vexatious litigant". The order of the court making such a pronouncement will then be published in the Government *Gazette*.

**[18]** This is not to say that a vexatious litigant no longer has access to the courts. A vexatious litigant may still institute legal proceedings. However, where the vexatious litigant wishes to do so, such a litigant is required to obtain leave of a judge. Logically, such leave ought to be secured before the proceedings are instituted; and such leave ought to be made before the court that had pronounced the person as a "vexatious litigant".

**[19]** It is for the vexatious litigant to satisfy the judge that leave to institute the particular legal proceedings ought to be granted in the particular facts and circumstances of the case. In other words, the applicant vexatious litigant would have to show reasonable cause for instituting legal proceedings.

**[20]** On the present facts and on a literal interpretation, it would appear that since the proceedings in the court below were not instituted by the first defendant but by the plaintiff para. 17 of the Schedule to Act 91 does not apply. Arguably, the first defendant is not required to procure the leave of the court that pronounced her as a "vexatious litigant" before instituting this appeal.

**[21]** However, on a careful reading of para. 17, it is our view that the first defendant is required to obtain leave before instituting the appeal proceedings. Paragraph 17 in fact extends to the present facts and circumstances.

**[22]** The relevant words for our present purpose are "instituting legal proceedings". The word "instituting" in para. 17 is used as a verb. *The Law Lexicon* (2nd edn 1997) defines the root word of "instituting" which is "institute" and, "legal proceedings" as follow:

> "Institute": Set on foot; commence. "Instituted," in respect of legal proceedings means, commenced ... To begin an action ... A counter-claim is a "Proceeding instituted" (*Hoods-Barrs v. Cathcart*, 1895 1 QB 873) ...

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> "Institute", when applied to legal proceedings, signifies the commencement of the proceedings. When we talk of instituting an action, we understand bringing an action …
>
> The word 'instituted' in s. 3(5) can therefore be taken as meaning 'settling on foot an enquiry' and is more than a mere filing of a claim. *S Suppiah Chettiar v. V Chimathurai* AIR 1957 Mad 216, 229 [Workmen's Compensation Act 1923, s 3(5)].
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> "Legal proceeding": means a proceeding regulated or prescribed by law in which a judicial decision may or must be given.
>
> The phrase "legal proceedings" is any proceedings in a court of justice by which a party pursues a remedy which the law affords him.

**[23]** It is first of all clear that the term "instituting" does not necessarily refer to commencing for the first time. It simply means to commence or commencing. Hence, the act of "instituting" is not confined to the filing of an action as a plaintiff or an applicant. It extends to where a litigant is responding to the proceedings instituted against the litigant.

**[24]** It is further clear that the phrase "legal proceedings" will include appeal proceedings, like the present proceedings. This phrase is not confined to originating proceedings. It includes and extends to proceedings in relation to an appeal. The present appeal proceedings are both prescribed and regulated by law, that is the Courts of Judicature Act 1964 (Act 91). Such proceedings are means by which a party pursues a remedy which the law affords the party. In these appeal proceedings, a judicial decision is rendered.

**[25]** Therefore, the phrase "instituting legal proceedings" used in para. 17 would obviously extend to the present appeal proceedings. Given the object of this additional power of the court, it would be an anathema if a vexatious litigant was able to circumvent that intent and purpose by suggesting that she did not institute the proceedings in the first place, and that she was merely pursuing a right of appeal as a dissatisfied party. To allow that interpretation would also defeat the object of that power. It is therefore appropriate and necessary that a purposive interpretation and construction be accorded to para. 17.

**[26]** The first defendant is an adjudged vexatious litigant. Since she has not taken any of the actions outlined above, that she has clearly not obtained the leave of a judge before instituting this appeal, this appeal is not maintainable by her.

**[27]** In any event and insofar as the other appellants and the substantive arguments in this appeal are concerned, the issue is one and the same for all the appellants before us. It is their common argument that the appeal ought

to be allowed because the seventh to the eleventh defendants should not be entitled to any distribution of Tan's estate as they were Tan's illegitimate children.

**[28]** Given that the orders sought by the plaintiff in encl. 7 was in essence the distribution of the estate of Tan, it is only proper that the terms of the consent order be examined. The learned High Court Judge did precisely that. Upon due and proper scrutiny, the court granted the orders sought by the plaintiff after having found that the terms sought were in accord with the terms in the consent order.

**[29]** The learned High Court Judge was unable to accept the contentions of the first and third to sixth defendants that despite the consent order, the estate ought to be distributed in accordance with the Distribution Act 1958. A distribution under the Act would potentially leave the seventh to the eleventh defendants out of the distribution. According to the court, the consent order is evidence of a contract between the parties. Until the order is set aside, it is binding on all the parties to the order.

**[30]** We fully agree with that reasoning. It is fairly settled and trite law that an order of the court reached by consent of the parties involved is in effect a contract between those parties – see *Ganapathy Chettiar v. Lum Kum Chum & Ors And Another Appeal* [1981] 1 LNS 59; [1981] 2 MLJ 145. Such a consent order must therefore be given its full contractual effect – see *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465. Such an order remains valid, effective and binding on all the parties involved until and unless the order is set aside for some vitiating reason - see the Federal Court's decision in *Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal* [1971] 1 LNS 143; [1971] 2 MLJ 75. In fact, until that happens, until and unless the consent order is set aside, the consent order operates as an estoppel disallowing the defendants today from departing from its terms.

**[31]** At the time of the consent order, the first defendant was present. She not only represented herself, she represented her four children. She and the children she represented, two of whom are now represented by their maternal uncle, cannot resile from the agreement they gave to the distribution of the estate of Tan.

**[32]** There are no applications afoot for the setting aside of the consent order in any manner whatsoever. Unless and until the consent order is set aside, the parties to the order, without exception, are bound to carry it into effect. The defendants had agreed that the plaintiff be appointed to carry out that distribution in the terms found in the consent order. The plaintiff must be allowed to carry out their duties and functions.

A **[33]** We further agreed with the learned High Court Judge that there is no mention of any distribution under or according to the Distribution Act 1958 anywhere in the consent order. That being so, the orders sought by the plaintiff were in order and the learned High Court Judge made no error, be it in law or on the facts, in granting the order in the terms made.

B **[34]** The appeal is accordingly dismissed. The first and the third to the sixth defendants shall each pay costs of RM5,000.

**[35]** We had further ordered, on the request of learned counsel for the plaintiff that the defendants before us should adhere to the proper title in filing the appeal and not to add "anak luar nikah" in respect of the seventh
C to eleventh defendants, and not to add the name "Tan Beng Hong (NRIC No: 420211-07-5143) Pengurus Kanan Tipu dan Pecah Amanah "*Res Judicata*") in respect of the plaintiff. We had caused the title used by the defendants be amended in line with the title of this judgment to reflect the original case before the High Court.

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